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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CLAYTON D. BLEHM, dba FDC Investments, Inc., Plaintiff, v. BETSY MCINTYRE and QUIKSILVER, INC., Defendants.	Case No. 08CV1358 BTM NLS **QUIKSILVER INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR, IN THE ALTERNATIVE, MOTION TO STAY ACTION PENDING RESOLUTION OF PRIOR STATE COURT ACTION** Date: October 17, 2008 Time: 11:00 a.m. Judge: Hon. Barry Ted Moskowitz Courtroom: 15 ***Per Chambers, No Oral Argument Unless Requested by the Court*** [Memorandum of Points and Authorities; Request for Judicial Notice; and Declaration of Molly J. Magnuson filed concurrently herewith]

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 17, 2008, at 11:00 a.m., in Courtroom 15 of this Court, located at 940 Front Street, San Diego, California, California, Defendant Quiksilver, Inc. ("Quiksilver") will appear and move the

Court for an order dismissing the claims asserted against it in Plaintiff Clayton Blehm, dba FDC Investments, Inc.'s ("Plaintiff") Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, for an order staying this action pending resolution of a prior state court action.

Quiksilver moves to dismiss the Complaint on the grounds that Plaintiff's claims are barred by res judicata. Just months ago, in a California state court, the very allegations at issue in this Complaint were tried by Plaintiff before a Court and jury, resulting in a defense verdict on all claims. In an attempted end-run around the Judgment entered in the prior state court action, Plaintiff has filed this action, attempting in his Complaint to conjure up some new basis for filing suit. Most notably, while in the prior action Plaintiff sued DC Shoes, Inc. ("DC Shoes"), the company of which he was formerly Chief Financial Officer, a thirty percent shareholder and director, here he sues Quiksilver – apparently based upon Quiksilver's subsequent acquisition of DC Shoes well after the relevant time period alleged in the Complaint; indeed, Plaintiff alleges no independent basis for his purported claims against Quiksilver. Judgment in the prior state court action was entered and served on Plaintiff's counsel on January 4, 2008. The Judgment therefore became final when Plaintiff failed to timely appeal.[1] Accordingly, Plaintiff's claims should be dismissed on the grounds that they are barred from relitigation by res judicata.

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[1] California Rules of Court Rule 8.104 requires that a notice of appeal be filed at the *earliest* of: (1) 60 days after the party filing the notice of appeal serves or is served with a notice of entry of judgment or a file-stamped copy of the judgment; or (2) the expiration of 180 days. Section 659 of the California Code of Civil Procedure requires that a motion for new trial be filed on the *earliest* of: (1) 15 days after the clerk's mailing of notice of entry of judgment; (2) 15 days after service by a party of written notice of entry of judgment; or (3) the expiration of 180 days. Despite being served with the Judgment on January 4, 2008, the day it was entered, Plaintiff waited until July 2, 2008 to file both his notice of appeal and notice of intention to move for a new trial. Both were untimely. DC Shoes has thus moved to strike Plaintiff's motion for new trial and has opposed Plaintiff's motion, in part, on the grounds that it was untimely. Additionally, in the event the Court of Appeals does not on its own dismiss Plaintiff's appeal as untimely, DC Shoes intends to move to dismiss that appeal.

Even if Plaintiff had timely appealed in the prior state court action and the Judgment therefore was not yet final, this Court should properly exercise its discretion to stay this action pending resolution of the prior state court proceeding under the abstention principles articulated by the United States Supreme Court in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Accordingly, Quiksilver hereby moves the Court, in the alternative, for a stay of this action pending resolution of the prior state court action.

Finally, in the event the Court does not dismiss the Complaint on res judicata grounds or stay the action pursuant to *Colorado River*, Quiksilver moves to dismiss the Complaint for Plaintiff's failure to satisfy the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities, Request for Judicial Notice and Declaration of Molly J. Magnuson, all filed concurrently herewith, the argument of counsel, all of the pleadings and other papers on file in this action, and such other matters as may be presented at the hearing on this Motion or prior to the Court's decision.

Dated: August 4, 2008

MICHAEL G. YODER
MOLLY J. MAGNUSON
O'MELVENY & MYERS LLP

By: [signature]
Molly J. Magnuson
Attorneys for Defendant
QUIKSILVER, INC.

PROOF OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 610 Newport Center Drive, 17th Floor, Newport Beach, California 92660-6429. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence collected from me would be processed on the same day, with postage thereon fully prepaid and placed for deposit that day with the United States Postal Service. On August 4, 2008 I served the following:

QUIKSILVER INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR, IN THE ALTERNATIVE, MOTION TO STAY ACTION PENDING RESOLUTION OF PRIOR STATE COURT ACTION

by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

Lauren Castaldi
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044

Roy R. Withers, Esq.
Law Office of Roy R. Withers
2802 Juan Street, Suite 12
San Diego, CA 92110

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 4, 2008, at Newport Beach, California.

Adonna Payne